IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1262 OF 1992

BETWEEN:

J.J. MTILA ..... 1ST PLAINTIFF

B.W. MWENDA ..... 2ND PLAINTIFF

L.T. MIZATI ..... 3RD PLAINTIFF

- AND -

STAGECOACH MALAWI LIMITED ..... DEFENDANT

CORAM: **KUMITSONYO, J.**
Msisha, Counsel for the Plaintiffs
Kaphale, Counsel for the Defendant
Mtchera, Official Interpreter
Matekenya (Mrs), Recording Officer

J U D G M E N T

The plaintiffs were at all material times employees of the defendants until their services were terminated on 9th October, 1992. In this action the plaintiffs by a writ of summons and statement of claim filed therewith are claiming damages against the defendants for false imprisonment, defamation and wrongful withholding of pension and other benefits. The claim for wrongful withholding of pension and other benefits was conceded by the defendants. This action will therefore pursue the claims on false imprisonment and defamation only.

In their statement of claim the plaintiffs aver that on 4th September, 1992, the defendants, acting through their servants, without justifiable or lawful cause, suspended the plaintiffs from their employment and on 9th October, 1992, terminated the said employment. Further, the plaintiffs also aver that on the same date, the defendants wrongfully directed, procured and instigated the Malawi Police to arrest and detain them on a false charge that the plaintiffs were liable for the misappropriation of the property of the defendants. Acting on the said direction and instigation the police arrested and

imprisoned the plaintiffs from 4th September, 1992, to 16th September, 1992. During the period of detention the plaintiffs were taken, while in handcuffs, to Stagecoach premises as well as to their homes for searches thereby exposing them to public redicule, contempt, acute shame and embarrassment. The defendants, by causing the plaintiffs to be exposed to the public while in handcuffs, represented to members of the said public that the plaintiffs were guilty of criminal conduct and thereby the plaintiffs suffered injury to their reputations.

In their defence the defendants deny all the allegations made by the plaintiffs in the statement of claim. The defendants aver that if the police arrested the plaintiffs the police acted on their own responsibility and not pursuant to any direction, instigations or request of their servants as alleged or at all. In relation to the allegation that the plaintiffs were paraded at their homes and at the premises of the defendants whilst in handcuffs, the defendants deny the said allegation and state that if such acts were done by the police, they were not done on the instructions or instigation of the defendants. The defendants also deny that such acts by the police could lead to an inference of criminal conduct or, if such inference could be drawn, the same would not be by reason of any wrongful act on the part of the defendants.

The facts which came out clearly in evidence were that at the time of termination of employment, the first plaintiff was a Shipping Supervisor, the second plaintiff a Cardex Supervisor and the third plaintiff a Driver. On 26th February, 1992, a consignmemnt of oil filters which was in a pallet was dispatched from AMI to Burlington Express Bonded Warehouse. The consignmeent was moved in a Stagecoach vehicle driven by the third plaintiff and Delivery Note Number 15487 being Exhibit D1 indicated that a pallet of SFC 61 cartons had been dispatched out of AMI. On 15th July, 1992, the consignment was finally cleared for consumption from Burlington Bonded Warehouse to Stagecoach stores and on 1st September, 1992, Delivery Note Number 18504 being Exhibit D2 indicated that one carton of oil filters being part load of the 61 cartons was dispatched out of AMI. For some unknown reason management of the defendants suspected fraud and on 4th September, 1992, the defendants invited the police to sit in on an inquisition which was being conducted by management in their Boardroom from 11:00 am to 3:00 pm. on that day. During that inquisition the plaintiffs were suspended from employment and at the end of the inquisition the plaintiffs were taken into police custody and were imprisoned at Chichiri Remand Prison where they remained under squalid conditions until 16th September, 1992, when they were released on bail. No criminal charge was laid in court against the plaintiffs during their imprisonment or after their release. The reason being that the investigations, which carried on for some days, failed to reveal any evidence of fraud.

It is interesting to note that in their investigations

management selected and picked on three persons only out of a whole host of persons who could have been involved if there was fraud at all. It would have included not only staff in Stagecoach stores, but also staff at AMI and Burlington Bonded Warehouse. Another point worth of note is that the defendants chose to ignore the fact that the plaintiffs had acted on documentation from the handling agents and from Stagecoach Stores. The first and second plaintiffs certainly did rely on certification from the stores receiving clerks in confirmation that all the goods had been received. They did not handle the goods themselves physically. This was done through the goods received notes which were completed by the clerks in the Stagecoach stores and countersigned by the Stores Supervisor. As for the third plaintiff, he was merely a driver of the conveyor of goods given to him for conveying from one point to another on the support of the delivery notes.

The plaintiffs' case, therefore, is that the filters which were alleged to have been stollen, were in a closed pallet and that all the plaintiffs did was to accept the evidence of AMI as to the goods dispatched. No fraud was involved because as soon as the short delivery was discovered the missing carton was collected. If fraud was behind the carton that remained at AMI it is reasonable to suppose that the carton would have been fraudulently disposed of between February and September 1992. Had the stores clerks raised a query on quantities in July 1992 when the filters were cleared out of bond and into Stagecoach Stores, the Cardex Clerks and the Shipping Supervisor would have been warned of the discrepancy.

As already stated in this judgment, the plaintiffs are claiming damages for false imprisonment and defamation. I will consider the claim of false imprisonment first. It is not in dispute that on 4th September, 1992, the plaintiffs were called to attend an inquisition in the Boardroom at Chichiri Stagecoach offices and it is in evidence that they were interrogated on a suspected fraud case from 11:am to 3 pm. The inquisition was being conducted by management of the defendants in the presence of two police detectives who were invited to attend. At the end of the inquisition, the plaintiffs were taken into police custody and locked up in cell at Blantyre Police Station and at Chichiri Remand Prison where they remained until 16th September, 1992. A question might be asked as to whether the defendants had presented a charge against the plaintiffs to the police before the arrest and detention.

On the evidence it is clear that the defendants invited the Police to sit in and listen whilst their management team was carrying out an inquisition on the plaintiffs. The team was in-charge of the investigations and the participation of the police was extremely limited. The objective was clearly to lay a charge of theft against the plaintiffs. It is in evidence that the defendants repeatedly accused the plaintiffs of theft during the inquisition. At the end of the inquisition and inspite of

the defendants' best efforts the police were only left with a suspicion that some offence may have been committed. The police, therefore, made no decision to arrest and as can be seen from the evidence, the police had to be requested to arrest the plaintiffs. On what basis then did the police act in arresting and detaining the plaintiffs.

I have already pointed out that the police were left with only some suspision that the plaintiffs may have committed an offence. However, there is no evidence to show that the police made a decision to arrest based on those suspicions. It is in the evidence of Detective Constable Chaima, which evidence I accept, that the police arrested the plaintiffs because Mr. Siula the Chief Personnel Officer had specifically requested the police to arrest. Mr. Siula directed or procured the arrest because he was of the view that because of the suspicions that the plaintiffs were guilty of fraud, it was necessary to prevent them from destroying documentary evidence by putting the plaintiffs in prison. Whether Mr. Siula's logic was reasonable or faulty, the fact remains that the police acted on his request in arresting and detaining the plaintiffs. It is the plaintiffs' case that management of Stagecoach Malawi Limited made a false charge of theft against the plaintiffs and procured the police to arrest and detain them. This point is fully supported by the evidence of the said Detective Constable which I have accepted already. The fact that the police acted on the basis of the request that evidence be protected, obviously could not have led to a charge being presented to any Court against the plaintiffs. It is clear from the evidence of Mr. Chaima that the police kept waiting for the defendants to arrange a meeting to resolve the issues between the plaintiffs and the defendants. The police eventually gave up when they realized that the defendants were not going to arrange such a meeting. If the police had formed an independent opinion as to the guilt of the plaintiffs based on their own investigations, they would not have waited for meetings to take place between the plaintiffs and management of the defendants. They would have proceeded to present charges against the plaintiffs in Court.

Now let me consider whether the defendants were legally liable for the arrest and detention of the plaintiffs. As to what constitutes an arrest or imprisonment the law is well settled. The classic definition of imprisonment appears in Terms de la Rey and reads as follows:-

> "Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stocks, or in the cage in the streets or in a man's own house as well as in the common gaole; and in all places the man so restrained is said to be a prisoner so long as he hath not his liberty fully to go at all times to all places whither he will without bail or mainprise or otherwise."

On the facts of the present case, there is ample evidence to show that the plaintiffs were suspect in the matter. For four hours in the Boardroom the plaintiffs were held for questioning and could not leave the room at will. After the inquisition they were arrested by the police at the request of Mr. Siula and driven to Blantyre Police Station in vehicles provided by the defendants and then to Chichiri Prison where they were detained until 16th September, 1992. In short, I am satisfied on the totality of the evidence that the plaintiffs were arrested and imprisoned by the police at the request of the defendants acting through their employees and in particular, Mr. Siula the Chief Personnel Officer and I so find accordingly.

The next question to be resolved is whether this was a wrongful arrest and imprisonment. Before I go any further I wish to say that I have considered with great care the arguments advanced by both Counsel in their submissions and I am much obliged to them for the authorities they referred me to. Had the police arrested pursuant to a charge laid by the defendants, they would have dealt with the plaintiffs in accordance with the provisions of Sections 32, 33 and 34(3) of the Criminal Procedure and Evidence Code. This would have entailed the granting of bail as soon as possible by the police themselves or the presentation of a charge before a court leading to judicial intervention in the imprisonment. It is trite law that where police arrest a person in compliance with the requirements of the law, and for the purposes of this case I am referring to the said Sections 32, 33 and 34 of the Criminal Procedure and Evidence Code, such an arrest could not ground an action for false imprisonment. In the instant case the arrest was a response to a request made by the defendants and the plaintiffs were not treated in accordance with the law. So I conclude that the arrest and imprisonment herein were wrongful and illegal.

The next question is whether the defendants and the police in the case at hand acted in compliance with the said requirements of the law. The first point to be considered here is whether the plaintiffs were reasonably suspected of having stolen the filters. In the final analysis this is a factual question whose answer must depend on the total facts brought out in evidence. It is important to note that matters involving the liberty of the individual or abuse of human rights must not be taken lightly. Courts must therefore proceed with caution in considering the question whether the private person or in this case the employer had reasonable cause for suspecting that a felony had been committed by the persons arrested. From the evidence of the plaintiffs and that of Mr. Tyler, it would appear to me that the defendants' servants had no reasonable ground for suspecting the plaintiffs in the matter at all. Firstly, it was asserted that staff in the stores of Stagecoach whose duty involved handling spare parts physically were not suspect. If one carton of the filters had missed, it would have been at AMI and Burlington Bonded Warehouse. Staff in these places should have been made suspect as well. Instead, the defendants only

selected the plaintiffs to be suspect. It was the argument of the plaintiffs that on these facts it was not reasonable to pick on them alone since the other staff could as well have stollen the missing carton of filters. I agree that on the totality of the evidence the defendants' servants had no reasonable ground for suspecting the plaintiffs in the matter, particularly when Mr. Tylor himself had admitted in cross-examination that the plaintiffs were suspended from employment and later dismissed for incompetence at their work and not for theft. In other words, no felony had been committed. On this point the law was settled long time ago by Sir Rufus Isaacs C.J. in the case of **Walters - vs - W.H. Smith and Son Limited** (1914) K.B. 595. It was held in that case that a private person is justified in arresting another on suspicion of having committed a felony if, and only if, he can show that the particular felony for which he arrested the other was in fact committed, and that he had reasonable and probable cause for suspecting the other of having committed it. At page 602 Sir Rufus had this to say:-

> "Interfearance with the liberty of the subject, and especially interfearance by a private person, has ever been most jealously guarded by the common law of the land. At common law a police constable may arrest a person if he has reasonable cause to suspect that a felony has been committed although it afterwards appears that no felony has been committed, but that is not so when a private person makes or causes the arrest, for to justify his action he must prove, among other things, that a felony has actually been committed."

In the instant case I have already found that the police arrested and detained the plaintiffs in response to and in compliance with the special request of the Chief Personnel Officer Mr. Siula in order to protect evidence of the suspected fraud. In that event the provisions of the Criminal Procedure and Evidence Code to which I have already alluded to would not come into play. Those provisions apply in the following situations:-

(1) Where the police arrest because a charge has been laid;

(2) Where the police arrest because information has been given on which it becomes their duty to act by arresting; and

(3) Where the police arrest on their own judgment.

In situations where an arrest and detention occur because of a special request by the defendants such as that the plaintiffs be kept in custody to safeguard evidence as was the case in this case, no question of bail or appearance before the Court would arise. In such a situation the party requesting the

arrest would be fully liable for the actions of the police. The police would have acted as agents of the party requesting the arrest and detention. The fact that the police may have been misguided in acceeding to the request to arrest and detain would not affect the liability of the requesting party as a principal. On the facts of this case it could not be said that it was unlikely that Mr. Siula would have made such a request. The truth is clearly that if there was fraud it could have involved personnel at AMI, personnel at Burlington Bonded Warehouse and personnel at Stagecoach Stores. Mr. Siula might have thought it was necessary to safeguard possible evidence in all these places. I find therefore that the defendants were liable for the arrest of the plaintiffs and their incarceration in prison from 4th to 16th September, 1992. It cannot lie in the mouth of the defendants, therefore, to contend now that Mr. Siula was only a junior manager and could not have had the capacity of authority to direct the arrest and the detention of the plaintiffs. Mr. Siula was the Chief Personnel Officer by rank, responsible for all personnel matters in the Company . My impression is that he was part of management. In any event it is clear to me that Mr. Siula was not acting in his personal capacity but as an agent of the defendants in the course of performing his duties. That is my finding.

The evidence of Detective Constable Chaima was clearly that Mr. Siula said, since the suspects might destroy evidence, for security reasons, the matter should be sorted out at the Police Station where it had already been reported and the suspects therefore had to go to the Police Station in order to safeguard evidence. This piece of evidence to me indicates very clearly that the reason which the defendants gave for seeking the arrest of the plaintiffs was that if the plaintiffs were left free, they could destroy evidence. On that basis I am satisfied that a direct and special request for the arrest of the plaintiffs was made to the police by the defendants through their servant Mr. Siula. The fact that the arrest and the imprisonment of the plaintiffs resulted as a response to the special request in order to protect evidence, must have caused the police to keep the plaintiffs in custody until such time as the police had realized that the request by the defendants was unreasonable and erroneous and needed to be abrogated if the law had to be seen to be respected. It is in the evidence of Detective Constable Chaima that at some point along the line the police realized that the defendants had failed to produce evidence to prove their accusations of theft against the plaintiffs and therefore the police released the plaintiffs on 17th September, 1992. On their release the plaintiffs were informed by the police that the plaintiffs were being released because the police had found out that the whole matter was a domestic affair of Stagecoach and it's employees. I would like to point out here that the police are to be commended for their decision to release the plaintiffs even though the defendants had not as yet at that time requested for the release. It was the holding in the case of **Malawi Railways Limited - vs - B.B. Mangombo** M.S.C.A. Civil Cause Number

3 of 1993 that if a private citizen who constituted himself a principal by requiring the police to arrest when there was no charge to prefer he must bear the consequences when the police as agents detain a person beyond the period envisage in the provisions of the Criminal Procedure and Evidence Code already referred to herein. With this authority in mind, I find that in the case at hand the defendants did constitute themselves as principal and must therefore bear the consequences when the police detained the plaintiffs in prison beyond the period required by law.

I now turn to consider whether there was defamation of the plaintiffs by the defendants. To refer to someone as a thief is undoubtedly defamation which is actionable per se. Evidence has shown that the plaintiffs were continuously accused of theft during the investigations. To parade someone by exposing him to the public while in handcuffs is clearly to suggest that that person has transgressed the criminal law. It is in evidence that the defendants, through their servants, provided transport to carry the plaintiffs around and in particular to Blanytre Police Station, then to Stagecoach Offices at Chichiri and then to their homes while in handcuffs and without shoes. At the offices they went during working hours and members of staff saw the plaintiffs in handcuffs and without shoes. In their homes too, wives and children of the plaintiffs and the public in the neigbourhood saw them in handcuffs and without shoes. The mere fact that the plaintiffs were paraded in this manner was defamatory. It is written in **Gatley on Libel and Slander 5th Ed.** at page 20 that conduct can amount to defamation. This parading amounted to defamation by conduct as well as publication of the said defamation to the public in the neigbourhood of the plaintiffs homes and to fellow employees at Stagecoach Offices. In the case of **Peoples Trading Centre - vs - Makhalira** Civil Appeal Number 1 of 1993 (HC) it was held that the finding by the Magistrate that the fact that the respondent was paraded and accused in the presence of members of the public was defamatory could not be faulted. The case of **Njolomole - vs - Tea Blenders & Packers Ltd.** Civil Cause Number 523 of 1992 (HC) is to be distinguished from the instant case. The difference is that the Court in that case found as a fact that the arrest and detention were not brought about by the defendants. That case did not involve the use of the defendant's vehicles and personnel to move the plaintiff around. In the instant case it was the servants of the defendants who moved the plaintiffs around using the vehicles of the defendants thereby engaging in the publication of the defamation constituted in the parading of the plaintiffs while in handcuffs and bear footed in the presence of the public, members of their families and their fellow employees. So I have found.

In the law of defamation, proof must be shown by the plaintiff that there was publication of the defamation. In the instant case, I must ask myself whether the conduct of the servants of the defendants did amount to publication of the

defamation. The answer is in the affirmative. I have already found that by using their vehicles to take the plaintiffs around while in handcuffs and without shoes on, the defendants were engaging in the publication of the fact of the arrest and imprisonment of the plaintiffs and by providing transport, the defendants were also facilitating publication of the defamation of the plaintiffs. It need not be emphasised that the police were at all times acting as agents of the defendants as can be read from the evidence. The police arrested and detained the plaintiffs in response to the request of the defendants who expressed a desire to protect evidence. The police did not arrest because they wanted to enforce the law. The clear evidence is that the police arrested because Mr. Siula requested the arrest. In whatever they did, therefore, the police were mere agents of the defendants. The defendants were responsible for the arrest and imprisonment of the plaintiffs and so I have found.

Indeed this is a civil action and the burden of proof thereof is that the plaintiffs need only prove their case on a balance of probabilities. I am satisfied that the plaintiffs have discharged that burden and therefore their claim in its entirety on both false imprisonment and defamation succeeds.

On the quantum of damages to be awarded on both heads of claim, I am extremely indebted to Counsel for the defendants, Mr. Kaphale, for his submissions and the authorities which he referred to me. I am most grateful to him.

The first two cases which were referred to me were (1) **Fordson Banda - vs - Southern Bottlers Limited** Civil Cause Number 41 of 1987 (HC) where the Court awarded the plaintiff the sum of K40,000.00 for false imprisonment for 30 days incarceration in prison and (2) **A.B. Nyirenda - vs - Import and Export Company of Malawi (1984) Ltd** Civil Cause Number 23 of 1989 (HC) where the Court awarded the plaintiff the sum of K25,000.00 for false imprisonment for 15 days of incarceration. Counsel has very rightly pointed out that in both these cases the Court found the defendants liable for false imprisonment after having made a charge against the plaintiff to the police and that in those cases the Court awarded damages for the entire period the plaintiff was in police custody. These cases should be distinguished from the instant case. The difference is that whereas in those two cases the Court did find that charges had been laid against the plaintiffs to the police, in the instant case I have already found that no charge was laid against the plaintiffs to the police. The defendants made a special request that the plaintiffs be arrested and detained in custody in order to safeguard evidence. The defendants were therefore liable for the entire period the plaintiffs spent in custody.

I agree that in the case of **M. Chiumia - vs - Southern Bottlers Ltd.**Civil Cause Number 707 of 1989, the plaintiff's action for false imprisonment failed because the judge found as a

fact that no charge was laid against the plaintiff to the police. That was the end of the case against the defendants in that case. The principle of law propounded by Unyolo J, as he was then, in that case on the issue of the length of imprisonment for which the defendant could be held legally liable in damages did not affect the decision of the Court in that case. It was merely meant to be for purposes of future guidance to the Courts. The Judge's statement of the law in that case was therefore mere obiter. In my opinion the decision in **Malawi Railways Ltd. - vs - Mangombo ante** did merely re-state the accepted principle of law that if a private citizen constituted himself a principal by requiring the police to arrest and detain a person when there was no charge preferred against him to the police, the private citizen must bear the consequences when the police detain the person beyond the period envisaged in the relevant provisions of the Criminal Procedure and Evidence Code. However, there was an attempt in that case by the Court to apportion blame between the police and the appellant. In the instant case the whole blame has fallen on the defendants for the reasons already given.

From the table of averages in the awards which Counsel gave me, if K2,100.00 damages were awarded for every 24 hour period of incarceration, taking the formula that 24 hours make a day, for 13 days the damages will be K27,300.00, which would be awarded to each plaintiff as damages for false imprisonment. For the satisfaction of my preference I have decided to award a round figure in this case and I therefore award the plaintiffs the sum of K25,000.00 damages each for false imprisonment.

As to damages for defamation, I have already found that the defendants were liable. It is now a matter of deciding on the quantum of damages to be awarded. I agree with counsel's submission that in the instant case the incidents were witnessed by a small group of people at the Stagecoach Offices and at their homes. Under these circumstances the damages for defamation to be awarded to the plaintiffs would have to be minimal. I award the plaintiffs the sum of K5,000.00 each damages for defamation. I also award costs to the plaintiffs to be taxed by the taxing master.

PRONOUNCED in open Court this 24th day of October, 1997, at Blantyre.

E.B.Z. KUMITSONYO
JUDGE